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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1903.

C. EWING PATTERSON, ET AL.,
Appellants.

vs.

JOHN Y. HEWITT, ET AL.,
Appellees.

BRIEF FOR APPELLEES.

H. B. FERGUSSON
Attorney for Appellees.

INDUSTRIAL APPRENTICE, ALBUQUERQUE

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BRIEF FOR APPELEES.

STATEMENT.

The transcript in this case contains only the pleadings, the findings of fact and the opinion of the Supreme Court of the Territory of New Mexico, from whose judgment this appeal is taken. Appellants rest their case on the findings of fact made by the two courts

below. Those two courts agreed upon the following findings of fact, to-wit:

1. That the real estate or mining ground, known as the Old Abe mining claim, in controversy in this suit, was about the year 1881 claimed by the complainants herein, and by one of the defendants, Watson, under the locations made by them of said ground, sometime in the year 1881; that between that time, the year 1881 and the year 1883, the complainants, in conjunction with the said defendant, Watson, did a large amount of work upon the said ground, and were claiming the same as the locators thereof under the mining laws of the United States.

2. The court doth also find that the said ground was also at the said date, to-wit, between 1881 and 1883, claimed by other parties, among whom was the defendant, Hewitt, and others.

3. The court doth further find that some time prior to August, 1883, some rich ore had been discovered within the boundaries of said ground by one of the complainants, Patterson.

4. The court doth further find from the evidence that the said ground was, in August, 1883, in dispute between the complainants herein and the said Watson upon the one side, and the said other parties upon the other.

5. The court doth further find that the said complainants and the said defendant Watson, and all of the parties who were interested in said ground, held a meeting in White Oaks in August or September, 1883,

for the purpose of adjusting the difficulties then existing between them in reference to the said ground, and to endeavor if possible to arrive at an agreement whereby the interests of all parties in said ground would be protected and preserved; that at the said meeting there were present the two complainants and the defendant Watson and the defendant Hewitt, and some other persons who were interested in said ground.

6. The court doth further find, that at the said meeting it was then and there agreed by and between the complainants herein and the said defendants, William Watson and John Y. Hewitt, and the other persons who were interested in said ground, that all of the old locations then existing upon the said ground, whether made by the complainants or any of the defendants of conflicting claimants therein, should be from that date abandoned, surrendered and given up by all of the parties, and that the said ground should be taken possession of by a trustee, who should locate the said ground in his own name, and hold the same as trustee for the benefit of all the parties then interested in said ground.

7. The court doth further find that it was agreed that the said John Y. Hewitt, the defendant herein, should be and was designated and agreed upon as a trustee, with direction and authority to locate the said ground in his own name, and to hold the same as trustee for all of the parties in interest; and it was further agreed by and between the said parties claiming the said ground, as well the complainants as the defendants

Watson and Hewitt, and the other persons interested therein, that sufficient work should be done upon said ground in order to discover mineral upon the said ground, and to obtain a patent therefor; and it was further agreed that said Hewitt, as such trustee, should make a deed to each of the said parties holding an interest therein, who should contribute his part of the work and labor and expenses in doing the necessary work in order to obtain the said patent; but there was no agreement as to what should become of the interest of any one who failed to contribute his share of the expenses. It was also agreed that each of the said complainants should he contribute his share of expenses should receive a one-eighth interest in said location so made by said Hewitt, and that the said Watson should also receive an eighth interest, and the said Hewitt should also receive an eighth interest, partially on account of his services, and in part on account of his interest in the ground, and that the remainder of said property should go to the other parties who were interested therein.

8. The court doth further find, that after the said agreement was made the said Hewitt took charge of said property thereunder; that the said Watson, defendant, and one of the complainants, Patterson, superintended and directed the work upon the said mine during the year 1883 and part of the year 1884.

9. The court doth further find, that there was a one-sixth interest in said mine which it was agreed should be sold, and which was sold to H. B. Fergusson for

the sum of five hundred dollars, which sum of money was to be used and was used in the working and development of the said mine after the said compromise agreement.

10. The court doth further find, that after said compromise agreement, in August or September, 1883, down to April, 1885, a large amount of work had been done upon the said property, to obtain a patent therefor, and sufficient to discover mineral thereon.

11. The court doth further find, that after said compromise agreement of August, 1883, there was contributed, either by the complainants themselves, or for them, sufficient means and labor to pay their proportionate shares of the work upon the said mine to obtain a patent and to entitle them to the deed therefor.

12. The court doth further find, that in April, 1885, the complainants herein had complied with their part of the agreement sufficiently to entitle them to a deed from the said John Y. Hewitt, as such trustee, for their one-eighth interest each in and to said mine under said agreement.

13. The court doth further find, that the said W. H. (?) Patterson in person and by his agent did in April, 1885, demand a deed from the said John Y. Hewitt to his one-eighth interest in and to said mine, but that the said John Y. Hewitt, the defendant herein, declined and refused to make the said deed to the said W .H. (?) Patterson for his interest therein.

14. The court doth further find, that the said Hewitt, as such trustee, has never made the said deed, but

has always declined and refused to make the same, and has disputed the right of the said Patterson to his deed to the said one-eighth interest in said mine under said agreement.

15. The court doth further find, that the said C. Ewing Patterson demanded his deed to the said one-eighth interest in said Old Abe mine of and from the said Hewitt, the defendant herein, immediately prior to the date of the institution of this suit; that no demand was ever made by said C. Ewing Patterson prior thereto, but that the said Hewitt, the defendant therein, failed, neglected and refused to make, execute and leliver any deed for said interest to said C. Ewing Patterson.

16. The court doth find, that the said defendants herein, John Y. Hewitt, William Watson and H. B. Fergusson, during the years 1885, 1886, 1887, 1888, 1889, and up to the year 1890, did and performed a large amount of work and expended a large amount of money on the said Old Abe mine, in addition to the annual assessment required by the Government of the United States thereon; that neither of the said complainants have ever contributed or offered to contribute any part of the said expenses of said work and labor.

17. The court doth further find, that in November, 1890, the said defendants, Watson, Fergusson, and Hewitt, discovered a large body of rich ore upon the said mine, and since said date have taken out a large amount of gold ore from the said property, amounting to several hundred thousand dollars, the exact amount of which does not appear from the testimony herein.

18. The court doth further find, that about the month of ———, 1892, a corporation known as the Old Abe Mining Company was organized by said Hewitt, Fergusson and Watson, and others, and that the said ground, known as the Old Abe ground in controversy herein, including the said one-eighth interest each, so claimed by said C. Ewing Patterson and said Henry Patterson, was by said Hewitt deeded to said Old Abe Mining Company, and that the said mining company is now claiming title thereto, and that the stock of said company was divided so that Hewitt held one-third, said Watson one-third, said Fergusson one-fourth, and one-forty-eighth each to four Wheeling parties, associated with Mr. Fergusson in his original purchase of one-sixth of the property, and the capital stock remained so divided at least down to the time of the taking of defendants' testimony in this case in January, 1896.

19. The court doth further find, that the said C. Ewing Patterson left the Territory of New Mexico and removed to the State of New Jersey in the year 1892 (?) and has never since returned nor resided in this territory.

20. The court doth further find, that the said Henry Patterson left White Oaks, New Mexico, about the latter part of March, 1885, and that after that time to the fall of 1892 he was a non-resident of this Territory, living in California, Arizona, and other places on the Pacific coast.

21. The court doth further find, that since the said

Henry Patterson left this Territory, in April, 1885, neither he nor the said C. Ewing Patterson have in any way or manner contributed any means or labor for the development or improvement of said mine, and had taken no steps whatever, prior to the bringing of this suit, to enforce their rights or interests in said property, or to require the said Hewitt to carry out his agreement of August and September, 1883. That from April, 1885, to a short time prior to the date of the institution of this suit, in 1893, the said Henry Patterson and C. Ewing Patterson were both out of this Territory, and took apparently no interest in said property, and made no effort in any way to enforce their rights thereunder until the date of the institution of this suit.

22. The court doth further find, that the said Henry Patterson through his agent, Henry Burgess, had knowledge that the said defendant, Hewitt, had declined, neglected and refused to carry out the said agreement and make to him and his co-complainant deeds to the interests which they claim in and to said mine; that he had such notice, first, in April, 1885, and that he had such notice again in the summer of 1887, and that he, with his co-complainant, C. Ewing Patterson, through information received, were fully advised after April, 1885, that the said Hewitt had refused to make said deed or carry out said trust agreement.

23. The court doth therefore find, as a conclusion from the proofs and evidence in this case, and the facts established that the complainants herein are barred

from any right of recovery in this cause, and the bill herein should be dismissed.

The above findings of fact, concurred in by the two lower courts, relate only to the defense of laches; the District (or trial) Court having dismissed appellants' bill solely on the ground of laches, and having found the facts only with that ground in view.

The Supreme Court of the Territory, however, found that appellants' cause of motion was founded upon a parol or unwritten contract or agreement in the following words, to-wit:

"The appellants in this case claim the interest for which they now seek to recover, under an agreement made between themselves, Hewitt and others at a meeting held in August or September, 1883. This agreement was a parol or unwritten contract or agreement. There is no pretense of a written contract or agreement in this case;" and hold that appellants were barred both by laches and by the statutes of limitations of the Territory of New Mexico. (Record, p. 60, folio 104.)

It should also be stated that appellants, in their bill of complaint, charged no fraud or concealment upon Hewitt's part, and failed to allege any reason or excuse for their long delay in instituting their suit.

Another important fact,—i. e., the change in the condition of the mining property in controversy before appellants brought this suit, and *after* their cause of action, is ephasized in the opinion of the Supreme Court of the Territory at page 51 of the transcript of the record.

THE DOCTRINE OF LACHES.

The defense of appellants' laches was properly sustained by the courts below.

The salient facts established are, in substance:

1. That Hewitt was made trustee for appellants and others by a special oral agreement made in August or September, 1883.

2. That it was the duty of said trustee to deed certain specified interests in the mining property to the parties in interest, on certain conditions, to be performed by each, and to refuse to deed to such of said parties as refused or failed to perform such conditions.

3. That said trustee, Hewitt, refused to make deeds to appellants from the first demand and continuously, and disputed their right to deeds under the agreement.

4. That, however, Hewitt had been mistaken in such dispute and refusal, and appellants had become entitled to their deeds under said agreement, at the conclusion of the work done under said agreement, and were so entitled from and after March, 1885.

5. That appellants were fully informed of such refusal, and had knowledge that their claimed rights under said agreement were repudiated by the trustee, Hewitt, from and after April, 1885.

6. Appellants instituted this suit in April, 1893.

7. At least one important witness was lost by reason of appellants' long delay. (Record, p. 53, folio 95.)

8. Fluctuation in the value of the property. (Record, p. 51, folio 92.)

9. Loss of testimony. (Record, p. 53, folio 95.)

10. Change of ownership. (Record, p. 54, folio 96.)

POINTS AND AUTHORITIES.

Appellants delayed the institution of their suit in this case for at least eight years. This, under the facts before this court, is laches.

Twin Lick Oil Co. vs. Marburry, 91 U. S., 587.

Great West Min. Co. vs. Woodmas of Alston, Min. Co., 23 Pac. Rep., 908.

Kinne vs. Webb, 49 Fed. Rep.. 512.

Harwood vs. R. R. Co., 17 Wall., 78.

Brown vs. Co. of Buena Vista, 95 U. S., 157.

Hayward vs. Bank, 96 U. S., 611.

Holgate vs. Eaton, 116 U. S., 33; also 8 Sup. Ct. Rep., 825.

Holgate vs. Eaton, 116 U. S., 33; also 8 Sup. Ct. Rep., 825.

Societe Fonciere vs. Millikin, 135 U. S., 304; also 10 Sup. Ct. Rep., 823.

Hammond vs. Hopkins, 143 U. S., 224; also 12 Sup. Ct. Rep., 418.

Hoyt vs. Latham, 143 U. S., 567; also 12 Sup. Ct. Rep., 568; also 54 Fed., 34.

Pratt vs. California Min. Co., 24 Fed., 369.

Manning vs. San Jacinto Tin Co., 9 Fed., 726.

Kline vs. Vogel, 1 S. W., 733.
Halsted vs. Grinnan, 14 Sup. Ct. Rep., 641.
Richards vs. Mackall, 8 Sup. Ct. Rep., 437.
Macabe vs. Mathews, 15 Sup. Ct. Rep., 190.
Evers vs. Watson, 15 Sup. Ct. Rep., 430.
Johnston vs. Atl. Transit Co., 15 It., 520.
Johnston vs. Min. Co., 148 U. S. 360; also 13 Sup. Ct. Rep., 585.
Foster vs. R. R. Co., 146 U. S., 88; also 13 Sup. Ct. Rep., 23.

Complainants are required to allege and prove satisfactory reasons or excuses for long delay.

Badger vs. Badger, 2 Wall., 87.
Godden vs. Kimmel, 99 U. S., 201, and cases above cited.

Complainants are held to diligence in efforts to ascertain; and means of knowledge are held to be the same as knowledge.

Morris vs. Haggin, 28 Fed., 275.
Grimes vs. Sanders, 93 U. S., 55.
Mining Co. vs. Watrous, 61 Fed., 163 and cases above cited.

Delay cannot be excused except by some actual hindrance or impediment caused by the fraud or concealment of the party in possession.

Wagner vs. Baird, 7 How., 234.
Lansdale vs. Smith, 160 U. S., 391.

The excuse of absence, ignorance and poverty are held not sufficient.

Naddo vs. Bardon, 51 Fed., 493.

Galliher vs. Caldwell, 145 U. S., 317; also 12 Sup. Ct. Rep., 562 and 873; and cases cited in the opinion.

REPUDIATION OF TRUST BY TRUSTEE.

In express, continuing trusts, the question of repudiation by the trustee is important. But even in express, continuing trusts, after such notice of repudiation, the statute of limitations and the doctrine of laches both apply in all their vigor.

Naddo vs. Bardon, 51 Fed. Rep., 493.
Speidel vs. Henrici, 120 U. S., 377; also 7 Sup. Ct. Rep., 610.
Philippi vs. Philippi 115 U. S., 151.
Felix vs. Patrick, 145 U. S., 317; also 12 Sup. Ct. Rep., 862.
Woods vs. Carpenter, 101 U. S., 140.
Godden vs. Kimmel, 99 U. S., 201.
Wallensak vs. Reiher, 115 U. S., 96.

THE STATUTE OF LIMITATIONS.

Appellants claim that the Statute of Limitations of New Mexico, limiting actions concerning real estate to ten years, and applying in terms to suits in equity, prevents courts of equity from applying the doctrine of laches for delay short of ten years.

The statute upon which appellants rely is found in the Compiled Laws of the Territory of New Mexico (1897), Sec. 2938, and is as follows:

"No person, nor their children or heirs, shall have,

sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments, but within ten years next after his, her or their right to commence, have or maintain such suit shall have come, fallen or accrued, and that all suits, either in law or equity, for the recovery of any lands, tenements or hereditaments shall be had and sued within ten years next after the title or cause of action or suits accrued or fallen, and at no time after the ten years shall have passed."

This contention is in conflict with the vast weight of authority.

The U. S. Supreme Court uses this language: "And the question of laches turns not simply upon the number of years which have elapsed since the accruing of her rights, whatever they were, and her assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occurring during that lapse of years. But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claims to be enforced; an inequity founded upon some change in the condition or relations of the property or parties."

Galliher vs. Cadwell, 145 U. S., 368 (13 Sup. Ct. Rep., 874).

Badger vs. Badger, 2nd Wallace, 94.

Harwood vs. R. R. Co., 17th Wallace, 78.

McQuiddy vs. Ware, 17th Wallace, 91.

Twin Lick Oil Co. vs. Marburry, 91 U. S., 587.

Sullivan vs. R. R. Co., 94 U. S., 807.

Brown vs. County of Buena Vista, 95 U. S., 157.

Hayward vs. Bank, 96 U. S., 611.

Holgate vs. Eaton, 116 U. S., 33 (6 Sup. Ct. Rep., 224).

Davison vs. Davis, 125 U. S., 90 (8 Sup. Ct. Rep., 825).

Societe Fonciere vs. Milliken, 135 U. S., 304 (10 Sup. Ct., 823).

Hall vs. Russell (Oregon U. S. Circuit Ct.) Vol. II, Fed. Cases, p. 648. Affirmed in 101 U. S., 503. Also reported in 3 Sawyer, 506.

Manning vs. Hayden (U. S. Circuit Court) Vol. 16 Fed. Cases, p. 645. S. C. 106, U. S., 586 (First Sup. Ct. Rep., 617). Also reported in 5 Sawyer, 360; 7 Reporter, 428; 13 West Jur., 317.

Lakin vs. Sierra County, 25 Fed. Rep. 337.

In the state courts, under limitation laws similar to our own, the cases are equally full to the point that inexcusable delay for a period short of the time prescribed by the statute, constitutes laches, and is an equitable defense wholly independent and outside of the statute wherever the relief sought is wholly equitable as in this case.

Missouri holds the same doctrine.

Bliss vs. Pritchard (1877), 67 Mo., 181.
Kline vs. Vogel, (Mo. 1886), 1 S. W. Rep., 733.
Tatum vs. Holliday, 529 Mo., 426.
Landrum vs. Union Bank, 63 Mo., 56.
Morseau vs. Talbot, 55 Mo., 297.
Davis vs. Fox, 59 Mo., 127.

The Supreme Court of Alabama says, in passing upon the statute of limitations of that State, which in terms is applicable to suit commenced by bill in chancery:

"Independent of statutory limitations courts of equity act upon a rule peculiar to themselves which is designed to promote diligence on the part of suitors by refusing the enforcement of stale demands. The rule is not abrogated by the statute making the limitations of action at law applicable to suits in chancery. The statutory limitations and the peculiar rule coexist."

Scruggs vs. DeCatur, etc., 5 So. R., 441.

The Supreme Court of New York says, in construing a similar statute in that State:

"In the present case the cause of action was not barred by the ten year statute applicable to equitable actions. But we apprehend that the period of limitation of equitable actions fixed by the statutes is not, where a purely equitable remedy is invoked, equivalent to legislative direction that no period short of that time shall be a bar to relief in any case, or precludes the Court from denying relief in accordance with equitable

principles for unreasonable delay, although the full period of ten years has not elapsed since the cause of action accrued."

Calhoun vs. Delhi, etc., 24 N. E. Rep., 27.
Haywood vs. City of Buffalo, 14 N. Y., 540.
Town of Venice vs. Woodruff, 62 N. Y., 462.
Town of Springfield vs. Bank, 75 N. Y., 397, and see
Waller vs. Nelson (Ala.) 18 So. Rep., 154.
Frame vs. Kenny, Am. Dec., 367. (Annotated).
Nettles vs. Nettles, 67 Ala., 599.
James vs. James, 55 Ala., 525.
Bergen vs. Bennett, Gaines Cases (N. Y.) 19.
Sheldon vs. Kockwell, 9th Wis., 166-184.
Novens vs. White, 6 Johns. Chancery, 360.
Kerr on Fraud and Mistake, p. 303 et seq.
Story Eq. Jur., Sec. 1520; Pomeroy's Eq. Jur., Sec. 817; also Sec. 917 and note.

Similar citations might be made to an almost unlimited extent, but we submit that the foregoing are sufficient to sustain the position of defendants, and that complainants' bill should be dismissed for laches, notwithstanding the statutory period had not elapsed when this suit was commenced.

APPELLANTS BARRED IN FOUR YEARS.

Leaving aside the laches of appellants, and the ten years statute of limitations, just discussed, appellants are barred by Sections 2916 and 2930 of the Compiled

Laws of 1897 of the Territory of New Mexico, which sections are as follows:

"2916. Those founded upon accounts and unwritten contracts: those brought for injuries to property or for the conversion of personal property or for relief upon the ground of fraud, and all other actions not herein otherwise provided for and specified, within four years."

"2930. None of the provisions of this act shall run against causes of action originating in or arising out of trusts, when the defendant has fraudulently concealed the cause of action, or the existence thereof, from the party entitled or having the right thereto."

The agreement, under which Hewitt's duties as trustee were prescribed and the rights of appellants were defined, was an "unwritten contract." And both the original bill of complaint of appellants and the findings of fact made by the courts below establish that no fraud or concealment of appellants' cause of action was practiced by Hewitt, but, on the contrary, his denial of the alleged rights of appellants was prompt and open and continuously adhered to.

St. Paul, etc., Ry. Co. vs. Sage, 49 Fed., 315.
Christy vs. Sill, 95 Pa. St., 315.
Hollinsheads Appeal, 103 Pa. St., 158a.
Silliman vs. Haas, 25 Atl. Rep., 72.
Way vs. Hooton, 26 Atl. Rep., 784.
King vs. Pardee, 96 U. S., 90.
Kellum vs. Smith, 33 Pa. St., 158.
Willard vs. Willard, 56 Pa. St., 119.

Porter vs. Mayfield, 21 Pa. St., 163.
Dole vs. Wilson, 40 N. W., 161.
Streitz vs. Hartman, 41 N. W., 804.

Did the trust agreement create an express trust?

If so, as, by its terms, it was not to be performed within one year, it is void under the statute of frauds.

The Statute of Frauds is in force in New Mexico.

Childers vs. Talbot, 16 Pac. Rep., 275.
Browning vs. Browning, 9 Pac. Rep., 677.

MINING CLAIMS ARE REAL ESTATE.

Mining claims are real estate.

Compiled Laws of New Mexico (1897) Sec. 2218.
Davis vs. Ford, 19 Pac. Rep., 414; also in 11 Sup. Ct. Rep., 417.

The five assignments of error, filed by appellants in this court, have been sufficiently treated in the foregoing brief of points and authorities.

Respectfully submitted,

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Attorney for Appellees.